

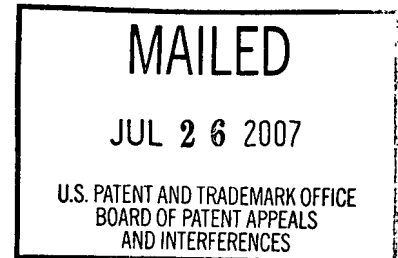
1 RECORD OF ORAL HEARING  
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3 UNITED STATES PATENT AND TRADEMARK OFFICE  
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6 BEFORE THE BOARD OF PATENT APPEALS  
7 AND INTERFERENCES  
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10 Ex parte PETER ROBERT FLUX  
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13 Appeal 2007-0748  
14 Application 09/890,771  
15 Technology Center 3600  
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18 Oral Hearing Held: July 12, 2007  
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22 Before STUART LEVY, LINDA HORNER, and ANTON FETTING  
23 Administrative Patent Judges  
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25  
26 ON BEHALF OF THE APPELLANT:  
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36 The above-entitled matter came on to be heard on July 12, 2007, at the  
37 United States Patent and Trademark Office, 600 Dulany Street, Alexandria,  
38 Virginia, before Virginia Johnson, Court Reporter.

1 JUDGE LEVY: Mr. Kushman.

2 MR. KUSHMAN: Good afternoon. This appeal involves an  
3 invention for fall arrest of systems. These are systems that are used where  
4 they have a line that's suspended from a tower and a worker who claims that  
5 the tower is attached to the line and has a device to prevent the fall in case of  
6 an accident. The invention involves a tensioning mechanism that's used at  
7 the bottom of the line to tension the line that's there.

8 JUDGE FETTING: Excuse me, I'm just having a little trouble  
9 hearing.

10 MR. KUSHMAN: I'm sorry, is that better?

11 JUDGE FETTING: Yes.

12 MR. KUSHMAN: There is one reference that's still an issue and that  
13 is the David reference, which involves lines that are -- rubbing lines that are  
14 used in mined elevators. The fall arrest lines are usually 200 to 300 feet in  
15 length. These mine rubbing lines for these elevators are normally on the  
16 order of thousands of feet, sometimes up to a mile or so, and they're much --  
17 rather than being lines that are a 1/4" in diameter, they're normally  
18 something on the order of 2 to 3 inches in diameter because they carry tons  
19 of weight rather than hundreds of thousands of pounds. I have to say one  
20 thing about my brief and the reply brief with respect to the David reference.  
21 Upon preparing for this appeal I had in there that the David reference has the  
22 device located at the top of the line, which is the way in which it's primarily  
23 taught. In fact, in the beginning of the reference they talk about the  
24 disadvantages of being located at the bottom of the line. However, as I was  
25 preparing I noted in the David reference, in the second page on the right  
26 column, just before the claims, that there is what I would call a boilerplate

1 statement that you could use it up or down. So, to the extent that my brief  
2 says that those -- that it's only located in the upper position in the David  
3 references, it's not correct. The argument that we have in this involves  
4 whether or not this is relevant prior art. And as we mentioned in the brief, in  
5 the reply brief, the difference in the uses, one being for fall equipment, to  
6 arrest a fall, and the other for guiding elevators, we call them, I guess they  
7 call them lifts in England where this patent was taken out. There are  
8 different uses.

9 JUDGE HORNER: Are you saying that if you use the tension device  
10 of David on a fall arrest system of your invention it wouldn't be capable of  
11 functioning tensionally?

12 MR. KUSHMAN: Well, it would -- I did some research on, you  
13 know, these analogous art and, you know, it would have a diameter to clamp  
14 a rope 3 or 4 inches in diameter as opposed to, you know, the 1/4". Now, if  
15 you size it, you know, I'm not saying that it couldn't function that way, I'm  
16 just, you know, I looked at the art in terms of analogous art, there is a case in  
17 the Deminski case in 1986, from the Federal Circuit, where they talk about  
18 the -- first you have to figure out whether there is, this is part of the  
19 inventor's field of endeavor. My position would be that it is not, when  
20 you're dealing with fall arrest equipment as opposed to guiding mined  
21 elevators. I think those are different arts. Next thing, even if it's not in the  
22 same endeavor, that case says that -- is it reasonably pertinent to the  
23 particular problem with which the inventor was involved. And the argument  
24 that I would put forth is that guiding an elevator is different, different in  
25 view of the diameter, the loads and the use involved, than a fall arrest  
26 equipment.

1 JUDGE HORNER: This is an anticipation rejection, in which case,  
2 non-analogous art really doesn't apply. If you look at the In re Schreiber  
3 case, it clearly states that, you know, you can have a reference from a  
4 different field and it'll still anticipate if it discloses the same structure. It has  
5 what's claimed, even if it's for internal use, it doesn't have to be the same  
6 use. I think that's what the examiner was relying on here, was that, that case  
7 law, to say that the structure of the David reference is the same, even though  
8 it's being used in a different environment.

9 MR. KUSHMAN: That's exactly what he's saying, and I looked at the  
10 cases and they go all different ways in terms of, you know, when you talk  
11 about analogous art, whether it's anticipation or just exactly what's involved,  
12 you know. What I'm saying is that if you look at something for winding a  
13 battleship anchor chain, is that the same analogous art to a fishing line? And  
14 my position, the reason I came down here is just to at least tell you verbally  
15 that I disagree. That's, basically, what our argument is.

16 JUDGE HORNER: Let me see if I have any questions. You argue,  
17 let me find it, I think it was at the conclusion of your initial brief --

18 MR. KUSHMAN: Um-Hum.

19 JUDGE HORNER: That's not it.

20 MR. KUSHMAN: The reply brief or the initial brief?

21 JUDGE HORNER: No, it was the initial brief, but it was in the  
22 conclusion section. You argued, on page 7, David lacks the disclosure of  
23 any bracket that's adapted to be fixedly mounted. Do you want to comment  
24 on that argument? It didn't appear in the rest of your -- in the discussion of  
25 David earlier in the discussion of the 102 rejection, but in the conclusion you  
26 mention it.

1           MR. KUSHMAN: Yeah, and then it goes on to say in a vertically  
2 oriented safety line. So, you know, I think that's what I'm saying there.  
3 And, also, there may have been some -- what I spoke about earlier, Judge, in  
4 terms of -- when I wrote this I had the David being located only at the upper  
5 end of the line, whereas as I mentioned earlier, I did -- in preparing for the  
6 appeal I noted that statement just before the claims in David and all that, it  
7 could be used either way.

8           JUDGE HORNER: Okay. I see. All right. Thank you.

9           JUDGE LEVY: Thank you.

10          MR. KUSHMAN: Thank you for your time. I appreciate it. Have a  
11 nice afternoon.

12          Whereupon, the proceedings concluded